IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 291.

ARCHIE J. McLAREN, ADMINISTRATOR OF THE ESTATE OF JOHN McLAREN, DECEASED, PETITIONER,

vs.

L. G. FLEISCHER, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF ON BEHALF OF PETITIONER.

The Facts.

The quarter-section of land involved in this case was entered as a homestead in February, 1903, by one Charles W. Rider, but in September, 1903, was withdrawn under the first

form of the Reclamation Act of June 17, 1902 (32 Stat., 388), and remained so withdrawn for nearly seven years thereafter (R., p. 9).

During this time and on June 6, 1905, the Interior Department provided by instructions (33 Land Decisions, 607, 609) that:

> "Any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry" (R., p. 24).

In February, 1908, L. G. Fleischer, respondent herein, contested the Rider entry and through such contest secured its cancellation on January 26, 1909 (R., p. 9).

Prior thereto, and on January 19, 1909, the Interior Department issued the following general instructions (37 Land Decisions, 365) in lieu of that above quoted, namely:

> "No contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where a contest has been allowed prior to such withdrawal, the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, *ipso facto*, terminate all right that was acquired by reason of such contest."

Notwithstanding these instructions, the local officers, on February 11, 1909, notified Fleischer of the cancellation of the Rider entry and that he would be allowed a period of thirty days after the restoration of the land within which to exercise a preference right (R., pp. 9, 10).

In January, 1910, the Secretary of the Interior directed restoration of this tract and other lands to public settlement on April 18, 1910, and to public entry on May 18, 1910 (R., p. 10). On the date first mentioned, John McLaren, under whom the petitioner here claims and who was fully possessed of all homestead qualifications, established settlement and actual residence upon the said quarter-section, and on May 18, 1910, filed proper homestead application (R., p. 10). Later the same day Fleischer filed homestead application without asserting any settlement right, but relying wholly on his alleged contestant's preference right (R., p. 10).

In the controversy which ensued from the filing of these conflicting applications, decisions were rendered by the different bureaus of the Interior Department in favor of Fleischer, though McLaren filed successive appeals and exhausted every remedy before the Department, until patent issued to his adversary in January, 1915 (R., p. 11). He also maintained residence upon the land with his family, cultivated it, and made improvements for a period of more than five years, or until ejected therefrom by judicial procedure on April 24, 1915 (R., pp. 10, 11, 13). Promptly thereafter he commenced action in the local courts of California to have a trust impressed on the land in his favor. Pending the outcome of this litigation he died and his administrator has been substituted as party in his stead (R., p. 18). After final decision against him by the Supreme Court of California (R., pp. 20-25), petition for writ of certiorari was filed in and granted by this honorable court, and the record has now come up for final action (R., pp. 27, 28).

ARGUMENT.

The question involved in this case, briefly, is whether or not a contestant's preference right of entry may be extended until thirty days after the land covered thereby has been restored from a first form reclamation withdrawal; and, of course, there is necessarily involved the question whether any valid contest can be initiated against an entry covering land included within such a withdrawal.

I.

The State courts have held in favor of such an authority in the Interior Department, but the Circuit Court of Appeals held directly to the contrary (Edwards *vs.* Bodkin, 249 Fed., 562; 265 Fed., 621), and the latter opinion has been affirmed by this honorable court in its decision rendered February 28, 1921, on a motion to dismiss or affirm (Bodkin *vs.* Edwards, No. 495, October Term, 1920).

The Supreme Court of California in its opinion here complained of (R., p. 25) dismisses the opinion of the Circuit Court of Appeals in a short comment, which, we submit, does not do justice to the reasoning of Judge Morrow nor apparently show full understanding of the same. We shall here quote at some length from that opinion, because, after citing section 2 of the act of May 14, 1880 (21 Stat., 540), and the 1905 regulations of the General Land Office (quoted *supra*), the learned judge held:

> "There are at least two objections to the application of these regulations to the defendant's contest. We do not find in the Reclamation Act any authority con-

ferred upon the Secretary of the Interior to so extend the limitation of the act of May 14, 1880. It is true he was authorized by section 10 of the Reclamation Act 'to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act (act June 17, 1902) into full force and effect.' But he was not authorized to amend, modify, or change the act of May 14, 1880, under which the defendant claims his preference right. But assuming, without so deciding, that this last-named act, construed in the light of the extension of time provided for in the act of June 27, 1906, authorized the Secretary of the Interior to give such instructions and to make such regulations, we are at once confronted with the second objection, based upon the fact that the regulations of June 6, 1905, relating to contested entries, were vacated before the defendant even attempted to make an entry under his supposed preferential right. The regulations of the Secretary of the Interior vacating the regulations of June 6, 1905, were issued January 19, 1909, and provided (37 Land Dec., 365) (quoted *supra*).

"These regulations went into immediate effect. If we hold that the Secretary of the Interior had the authority to make the regulations of June 6, 1905, we must also hold that he had the authority to make the regulations of January 19, 1909. If he had the authority to make, he had the authority to unmake. If he could amend or modify the statute in one case, he could do so in the other.

"When the regulations of January 19, 1909, were issued, no entry of the land had been made by the defendant. The withdrawal had been made before the termination of the contest and before entry by the defendant. The defendant had acquired no vested right to enter the land, but merely a preferred right of entry against every one except the United States.

> and this right, extended by regulation, might be terminated at any time. This was the decision of the Assistant Secretary of the Interior on February 17, 1909, in the case of David A. Cameron, 37 Land Dec., 450. We are of opinion that whatever preferential right the defendant had secured by his contest was terminated by the regulations of January 19, 1909."

The reasoning of Judge Morrow is cogent and cannot be dismissed in a few words, as the State court has attempted to do, especially when it has overlooked entirely his holding based upon the later regulations of the Department, adopted January 19, 1909. We will speak more of these later regulations *infra*.

The second section of the said act of May 14, 1880 (*supra*), provided that a contestant who had secured the cancellation of a homestead, pre-emption, or timber-culture entry shall be notified of such cancellation "and shall be allowed thirty days from date of such notice to enter said lands." This language is clear and unmistakable, and the words "thirty days from date of such notice" cannot be transmuted by any process into "one year, three months, and one week after such notice," as has been done by the State courts in the present instance; for, after receiving notice of the cancellation on February 11, 1909, Fleischer tendered no homestead application until May 18, 1910.

It is true that the Reclamation Act authorizes the Secretary of the Interior in general terms to make rules and regulations to carry it into effect, but this could not empower him to set aside an express provision of a previous act of Congress, passed on a different subject and which has not since been repealed or modified by any act of Congress. To so construe the later act would be to disregard the important rule of

statutory construction that repeal of a statute by implication is not favored (Potter's Dwarris on Statutes, 156; Sedgwick on Statutory Construction, 98; McCool *vs.* Smith, 1 Black, 470; "The Distilled Spirits," 11 Wallace, 356; State *vs.* Stoll, 17 Wallace, 430; Secretary Hitchcock's opinion in Edwin J. Miller, 35 L. D., 411).

The repeal of statutes by implication is not favored by the courts. The presumption is always against the intention to repeal where express terms are not used. To justify the presumption of an intention to repeal one statute by another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed. It follows that where the intention not to repeal is apparent or manifest from an act, there is no room for repeal by implication, or the application of rules regarding implied repeal (36 Cyc., 1071, 1072, and cases cited).

In the words of Mr. Justice Story (Wood *vs.* United States, 16 Peters, 342, 363):

> "The question resolves itself into the more narrow inquiry, whether it has been repealed by necessary implication. We say by necessary implication; for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy."

These words are particularly apt here, where we have for consideration the basic statute on settlement rights, on contests, and on relinquishments, namely, the act of 1880, and

the basic statute on reclamation, namely, the act of 1902. These subjects are wholly different, though, of course, both relating to the public lands, and it cannot be urged that the act of 1902 repealed the act of 1880 merely by virtue of the general authority in section ten to make rules and regulations any more than it repealed or modified all previous statutes relating to the public domain. It need hardly be argued that the mere authority to make rules and regulations under a law does not empower the Secretary of the Interior to modify or repeal previous laws passed by Congress on different subjects.

We therefore urge that the regulations of 1905, quoted above, were unauthorized and invalid and could not possibly result in the extension of a preference right of entry for thirty days—admitting for the purpose of argument that such a preference right ever existed here—into one of fifteen times that long.

II.

However, even though it should possibly be ruled that the regulations of 1905 were lawful and reasonable, the fact remains that they were recalled and abrogated by the Secretary of the Interior in 1909 before Fleischer had gained any preference right, and, accordingly, have no application to the facts of this case. There can be no doubt that if the Department had the authority to make the regulations of 1905 it was fully authorized to make those of 1909; or, in the language of Judge Morrow, "if he had the authority to make, he had the authority to unmake." These later regulations have been entirely overlooked by the State courts, hence the opinion of Judge Lawlor as to "what the Land Department has consistently held" (R., p. 24) is therefore wholly er-

roneous, and we believe it would be rather difficult to find any consistency between the regulations of 1905 and 1909, since they are directly contrary to one another. We do, however, find a consistency in the decisions of the Department on the subject of the time when a contestant's preference right of entry attaches, and also upon the manner in which that right may be withdrawn or the penalty remitted.

Secretary Hitchcock thus ruled in the leading case of Strader *vs.* Goodhue (31 L. D., 137, 138):

> "The preference right is not a right vested until a contestant has 'contested, paid the land office fees, and procured the cancellation' of the entry attacked. This is the plain wording of the acts of May 14, 1880 (21 Stat., 140), and July 26, 1892 (27 Stat., 270). The contestant's preference right is in the nature of a reward offered to an informer. The general rule as to the vesting of right under such statutes accords with the plain wording of this statute—viz., that the right does not become vested until judgment, and may be cut off (1) by a repeal of the statute (United States *vs.* Connor, 138 U. S., 61); (2) by a pardon (United States *vs.* Harris, 1 Abbott, U. S., 110; United States *vs.* Lancaster, 4 Wash., U. S., 64; Brown *vs.* United States, 1 Wool., U. S., 198); or by remission of the penalty by competent authority pending the proceedings (United States *vs.* Morris, 10 Wheat., 246)."

To the same effect are the decisions of the same Secretary and of subsequent Secretaries of the Interior in McCraney *vs.* Heirs of Hayes (33 L. D., 21, 24, 25); Stevenson *vs.* Scharry (34 L. D., 675, 678); Taylor *et al. vs.* Graves (36 L. D., 80, 82); Crook *vs.* Carroll (37 L. D., 513, 514); Virinda Vinson (39 L. D., 449).

In the leading case of Crook *vs.* Carroll (*supra*), the Department, after quoting the provisions of section 2 of the act of May 14, 1880, thus ruled:

> "The right given by this statute is in the nature of a reward to an informer, *and the statute must be construed strictly.* It is familiar law that an offer of reward conveys no right beyond the specific terms of the offer, *that it may be withdrawn at any time,* and that until something has been done to establish a right under the offer, a claimant takes nothing by reason thereof. 'Whoever claims under such an offer must bring himself within its terms. Failing to do that, his compensation is the consolation which comes to every citizen from the discharge of a public duty, which is the common obligation of all.' United States *vs.* Connor (138 U. S., 61, 65, 66)." (Italics are ours.)

The Department has gone further than this and has consistently held that even after a contestant's preference right has attached by reason of his success in the contest proceedings and the cancellation of the entry contested, the right of the United States may, during the thirty days after notice, intervene and prevent the exercise of such preference right, as, for instance, by a withdrawal of the land for forestry or other purposes (Jefferson E. Davis, 19 L. D., 489; William H. Schmith, 30 L. D., 6; Emma H. Pike, 32 L. D., 395; David A. Cameron, 37 L. D., 450). We merely refer to this as showing how erroneous is the construction of the Supreme Court of California as to what "the Land Department has consistently held."

The facts here are that the Rider entry was not canceled until January 28, 1909, but previously thereto, and on January 19, the Department had issued regulations which absolutely prevented the attachment of a preference right. In

other words, it amounted to a withdrawal of the offer of reward, and, accordingly, the action of the local officers in issuing Fleischer notice on February 11 was wholly unauthorized and invalid, and, of course, did not operate to create a right when same had previously been withdrawn by their superior officers.

We have argued this phase of the case as though Fleischer's contest against Rider were properly filed and as though he might have gained a preference right had not the regulations of 1909 issued before cancellation of the Rider entry. We believe, however, that in view of the provisions of the Reclamation Law the contest was erroneously and improvidently allowed; because the entry, covering lands within the limits of a first form withdrawal, was effectually suspended from any proceedings either upon or against it, and the contest, being thus invalid *ab initio,* could not possibly result in the acquisition of a preference right, even though the Interior Department had not by issuing the regulations of 1909 corrected its previous faulty position. Accordingly, by using the words "preference right" throughout this argument, we do not wish to be understood as admitting that such right ever existed in Fleischer, or that his contest was at any time a lawful and proper one.

III.

In conclusion, we suggest that the regulations of January 19, 1909 (*supra*), were in full force and effect when John McLaren settled upon the land and had been for fifteen months prior thereto; McLaren relied upon them, he was justified in so relying, and upon the faith of them and of their being ultimately recognized by the Department or the courts he has waged a ten-year fight for their enforcement;

and so have the other settlers in the companion cases, some of them suffering even criminal proscution and imprisonment in an effort to maintain their rights (Edwards and Culpepper *vs.* United States, 223 Fed., 309).

In addition, he resided upon the land, improved and cultivated it for a period of more than five years after entry, and, accordingly, gained title under Section 2297 of the Revised Statutes (Lawrence *vs.* Phillips, 6 L. D., 143).

The law deals tenderly with the rights of a settler on the public lands (Ard *vs.* Brandon, 156 U. S., 537, 543; Tarpey *vs.* Madsen, 178 U. S., 215, 221).

> "It is a well-established principle, that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him" (Lytle *vs.* Arkansas, 9 Howard, 314).

Accordingly, we respectfully urge that not only the law but the equities are with the petitioner, his decedent being both the prior applicant and the prior settler, while his adversary relies upon a mere paper right, which was in conflict with a positive act of Congress and had been declared non-existent by regulations of the Department of the Government charged with the administration of the public domain.

We therefore pray that the decision of the Supreme Court of California be reversed.

Respectfully submitted,

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